NO. 89-1543

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANKLIN LEE FISHER,
Petitioner,

Versus

IDA MARIE CUTLER LYONS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does this diversity of citizenship case ultimately turning on unique principles of Louisiana law present "special and important reasons" warranting review by this Court?

2. In a title dispute over mineral property, a motion for summary judgment is filed in which the key issue presented and argued is whether a donation in the mover's chain of title violated Louisiana law and was an absolute nullity. After being extensively briefed and argued before the district court and the court of appeals, the higher court held that the donation violated Louisiana law and was a nullity. On remand, may the mover ignore the appellate decision simply by contradicting his own prior testimony on this issue?

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STATUTES WHICH CASE INVOLVES

> The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself.

La. Civ. Code art. 1533 (repealed and amended 1974).

> The price of the sale must be certain, that is to say, fixed and determined by the parties.
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> It ought to consist of a sum of money, otherwise it would be considered as an exchange.
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> It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.
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> It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

La. Civ. Code art. 2464

This brief is respectfully submitted by Ida Marie Cutler Lyons and her sisters, the plaintiffs-respondents, in opposition to the petition for writ of certiorari filed by Franklin Lee Fisher.

COUNTERSTATEMENT OF THE CASE

A. *Nature of the Case.*

This is an action for declaratory judgment. 28 U.S.C. § 2201; Fed. R. Civ. P. 57. Federal subject matter jurisdiction is based solely upon diversity of citizenship. 28 U.S.C. § 1332. Louisiana law furnishes the rule of decision. 28 U.S.C. 1652; *Hanna v. Plumer*, 380 U.S. 460 (1965).

The plaintiffs-respondents sued for declaratory judgment recognizing them as owners of an undivided one-half interest in the minerals underlying the Northwest Quarter of Section 34, Township 11 South, Range 3 West, Vermilion Parish, Louisiana (hereinafter "the Northwest Quarter"). Suit was brought against Franklin Lee Fisher, the mineral co-owner of the Northwest Quarter, and Hunt Oil Company, which leased the Northwest Quarter from both the plaintiffs-respondents and the defendant-applicant, Franklin Lee Fisher. Suit was brought after Franklin Fisher and Hunt Oil Company executed an amendment to this mineral lease that recognized Franklin Fisher as the sole owner of the minerals.

B. *The Factual Background.*

This diversity of citizenship case involves a familial dispute over title to mineral property in Vermilion Parish, Louisiana, originally owned by the parties' common ancestor. The plaintiffs-respondents are the children and heirs of Hazel Bertha Fisher, and are suing in their in-

dividual capacities and as trustees for various trusts for their children. (For the sake of clarity, the plaintiffs-respondents will be referred to as the "Fisher Nieces." Franklin Lee Fisher, the defendant-petitioner, will be referred to as "Franklin Fisher.")

Franklin Fisher and Hazel Bertha Fisher were the only children and the sole heirs of Julie Ida Fisher, who owned the Northwest Quarter prior to May, 1968. On May 7, 1968, Julie Ida Fisher executed a donation of the Northwest Quarter to Hazel Bertha Fisher and Franklin Fisher, reserving the minerals. *Lyons v. Fisher*, 888 F.2d 1071, 1072 (5th Cir. 1989) (*reprinted in* Petitioner's Petition for a Writ of Certiorari, app. 3a-5a) [hereinafter cited "*Lyons v. Fisher II,* petitioner's app. 3a-5a"]. The next day, May 8, Hazel and Franklin purportedly "sold" the usufruct[1] of the Northwest Quarter back to Julie Ida Fisher for a recited consideration of "TEN AND NO/100 ($10.00) DOLLARS and other good and valuable considerations and services rendered." *Id.* On November 27, 1972, Hazel Bertha Fisher sold her undivided one-half interest in the Northwest Quarter to Franklin Fisher, reserving the minerals. *Id.* On January 12, 1975, Julie Ida Fisher died intestate, survived only by Hazel and Franklin, who inherited her estate in indivision. *Id.* In November of 1978, mineral operations were conducted on the Northwest Quarter. *Id.*

In August of 1983, the Fisher Nieces and Franklin Fisher jointly leased the Northwest Quarter to Hunt Oil Company for mineral exploration. A producing well was

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1. Under Louisiana law, a "usufruct" is the right to possess, use, and enjoy the property and the right to receive the fruits produced by the property. *Clarke v. Brecheen*, 387 So. 2d 1297, 1301 (La. App. 1st Cir. 1980); La. Civ. Code arts. 535-629.

completed. Shortly thereafter, in March of 1985, Franklin Fisher and Hunt Oil Company privately negotiated, and then publicly recorded, an amendment to the 1983 lease. This amendment recognized Franklin Fisher as the *sole* owner of the minerals underlying the Northwest Quarter. *Id.* Hunt Oil Company thereafter ceased paying royalties to the Fisher Nieces. Half of the royalties is being paid to Franklin Fisher, while the other half is being withheld pending the outcome of this suit.

The Fisher Nieces have *not* sued to annul Hunt Oil Company's lease, as Franklin Fisher states. They have sued to annul the *amendment* to that lease recognizing Franklin Fisher as sole owner of the minerals. The Fisher Nieces are parties to Hunt's lease, and the last thing they want is to annul it. Hunt has leased this property from *both* parties, and is therefore unaffected by the outcome of this suit. The gravamen of the suit is whether Franklin Fisher owns *all* of the minerals underlying the Northwest Quarter, or whether the plaintiffs-respondents, his three nieces, own one-half of the minerals, and are entitled to one-half of the lease royalties.

C. *Course of Proceedings and Disposition in Courts Below.*

The ultimate issue in this case was which party had title to the disputed one-half mineral interest. Because of a statute of limitations peculiar to Louisiana mineral law, this issue turned on whether the 1968 donation of the Northwest Quarter referred to above is valid. If it is not, the Fisher Nieces' title prevails.[2]

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2. The Fisher Nieces and Franklin Fisher both claim ownership of the disputed property from Julie Ida Fisher, their common ancestor. They disagreed, however, as to whether this property passed from this

The Fisher Nieces take considerable exception to Franklin Fisher's description of the proceedings below. His

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Footnote 2 continued.

ancestor by donation or inheritance. Whether title passed by way of the 1968 donation or through inheritance in 1975 was critical because of a statute of limitations applying to mineral property under Louisiana law.

Unlike the other states, Louisiana has a "nonownership" theory of mineral property. When mineral rights are conveyed to someone other than the fee owner, this does not create a separate mineral "estate." Rather, the conveyance establishes a "mineral servitude"—a type of easement granting the right to explore for minerals on the property and to reduce them to possession. La. Rev. Stat. § 31:21. This servitude is extinguished after ten years by a statute of limitations called the "prescription of nonuse." *Id.* The running of this prescription period, however, is interrupted by drilling operations or production of minerals on the property. *Id.* § 31:29. When the mineral servitude prescribes, the mineral rights revert to the current fee owner.

Mineral operations sufficient to interrupt the running of the prescription of nonuse did not occur on the Northwest Quarter until November of 1978. *Lyons v. Fisher II,* petitioner's app. 4a. This is several months beyond the ten-year anniversary of the attempted donation of the Northwest Quarter. *Id.* The 1968 donation contains a mineral reservation. If the donation is valid, this mineral reservation would have created a mineral servitude. Although this servitude eventually would have been inherited by the Fisher Nieces, it would have terminated under Louisiana's ten-year prescription of nonuse.

This is precisely the theory Franklin Fisher seized upon in claiming his nieces' mineral interest. In 1978, he contended, he was the fee owner of the Northwest Quarter, and termination of the servitude at that time would give him the mineral rights.

The Fisher Nieces, however, contended that the 1968 donation is invalid. In such a case, Julie Ida Fisher would have continued to own the Northwest Quarter until her death in 1975. At her death, her heirs, Hazel Bertha Fisher and Franklin Fisher, inherited her estate in undivided ownership—including undivided ownership of the Northwest Quarter. La. Civ. Code art. 888. Prior to this, in November, 1972, Hazel Fisher sold an undivided one-half interest in the Northwest Quarter to Franklin Fisher, *but reserved the minerals.* This sale, although ineffec-

claim that the validity of the 1968 donation was "pretermitted" and "not at issue" when he moved for summary judgment is simply incorrect. To the contrary, the validity of the donation was a *key issue presented when Fisher moved for summary judgment. See infra,* pp. 13-15.

After removing this suit to the United States District Court for the Western District of Louisiana, Franklin Fisher moved for summary judgment, claiming to be the sole owner of the minerals underlying the Northwest Quarter. Original Record 120-129; *Lyons v. Fisher II,* petitioner's app. 4a-5a. In support of his motion for summary judgment, Franklin Fisher introduced the 1968 donation into evidence, pleaded its validity, and claimed to have acquired ownership of the disputed mineral interest through this donation. Original Record 130-132, 138-143; *Lyons v. Fisher II,* petitioner's app. 7a. In opposing his motion, the Fisher Nieces attacked the validity of the 1968 donation, arguing that it violated Louisiana Civil Code article 1533. Original Record 186-196; *Lyons v. Fisher II,* petitioner's app. 7a. That statute (repealed in 1974, but not retroactively) prohibited an owner of immovable (real) property from donating the property and reserving the usufruct of the property. The Fisher Nieces contended the 1968 donation violated this statute because, as part of the transaction

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Footnote 2 continued.

tive at the time because Hazel did not yet actually own any interest in the Northwest Quarter, became effective, under the after-acquired title doctrine, in 1975 when she inherited a one-half interest in the Northwest Quarter. *See, Lyons v. Fisher,* 847 F.2d 1158, 1161-62 (5th Cir. 1988)(*reprinted in* Petitioner's Petition for a Writ of Certiorari, app. 7c-10c) [hereinafter cited "*Lyons v. Fisher I,* petitioner's app. 7c-10c."]. At that time, under the after-acquired title doctrine, Franklin Fisher was vested with what was sold to him by Hazel, her *surface* ownership of the Northwest Quarter. But the mineral reservation in Hazel's 1972 sale created a mineral servitude on the after-acquired property, under Louisiana Civil Code article 726. This servitude was created in 1975, well

the donors sold the usufruct of the donated property back to the donor. This so-called "sale" of the usufruct was a sham, they claimed, because the donor had not bought the usufruct for its true worth. In support of this argument, the Fisher Nieces pointed to the language of the donation/usufruct sale itself, and introduced into evidence Fisher's deposition testimony in which he (when questioned about the usufruct sale) basically conceded the usufruct transaction was a gift back or reservation, and not a true sale. Original Record 230-242, 438-541. *Lyons v. Fisher II,* petitioner's app. 7a.

In response to this challenge, Franklin Fisher argued that the consideration recited in the sale instrument was adequate under Louisiana law to support a "sale" of the usufruct. He vigouously contended the donation was valid. *Lyons v. Fisher II,* petitioner's app. 7a. Both parties briefed and argued the validity of the 1968 donation.

The district court granted Franklin Fisher's motion for summary judgment, holding that Franklin Fisher owned the disputed mineral interest. Ruling, *Lyons v. Fisher,* No. 85-3629 (Oct. 13, 1987); *Lyons v. Fisher II,* petitioner's app. 4a-5a. The Fisher Nieces appealed that ruling on the grounds that the 1968 donation—an essential link in Fisher's chain of title—violated Civil Code article 1533 and was a nullity. *See Lyons v. Fisher,* 847 F.2d 1158, 1158 (5th

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Footnote 2 continued.

within the ten-year prescription period prior to the 1978 drilling activities. The Fisher Nieces inherited this servitude from their mother and therefore own the one-half mineral interest disputed in this suit.

In short, if the 1968 donation was invalid, the Fisher Nieces own this interest, and should be receiving one-half of the royalties (with Franklin Fisher receiving the other half).

Cir. 1988) (*reprinted in* Petitioner's Petition for Writ of Certiorari app. 1c-10c") [hereinafter cited "*Lyons v. Fisher I,* petitioner's app. 1c-10c"] The validity of the donation was again briefed and argued by both parties. *Lyons v. Fisher I,* petitioner's app. 2c. The United States Court of Appeals for the Fifth Circuit reversed the district court, specifically holding that the 1968 donation violated article 1533 and was null, and remanded the case "for further proceedings consistent with this court's opinion." *Lyons v. Fisher I,* petitioner's app. 1c-10c.

On remand, Franklin Fisher sought to redetermine the validity of the 1968 donation. The district court ruled that the validity of the 1968 donation was the law of the case. Ruling, *Lyons v. Fisher,* No. 85-3629 (W.D. La. Dec. 16, 1988) (Petitioner's Petition for Writ of Certiorari app. 1b-3b). There being no other contested issue in this case, summary judgment was granted in favor of the Fisher Nieces. *Id.* Franklin Fisher appealed, and the court of appeals unanimously affirmed the trial court's decision. *Lyons v. Fisher II,* petitioner's app. 1a-11a. Franklin Fisher now seeks writ of certiorari to review that decision.

SUMMARY OF ARGUMENT

1.

This diversity of citizenship case ultimately turns on an interpretation of Louisiana Civil Code article 1533, a statute repealed in 1974, and the application of unique principles of Louisiana donations, sales, and successions law. It affects no interest beyond the private apportionment of mineral royalties among these family members. It presents no "special and important reasons" warranting review by this Court.

2.

The courts below correctly applied the law-of-the-case doctrine. The petitioner's claim that this doctrine was misapplied is based on an incorrect description of the proceedings below. The decisions below are in accord with decisions of this Court and the circuit courts of appeals.

REASONS FOR DENYING THE WRIT

1. *This diversity of citizenship case ultimately turns on application of a now repealed Louisiana statute; it presents no "special and important reasons" warranting review by this Court.*

A petition for writ of certiorari is appropriate only where some compelling *public* interest is at stake. This Court does not sit to adjudicate issues of interest solely to the particular litigants. "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1954). "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *National Labor Relations Board v. Pittsburgh Steamship Co.,* 340 U.S. 498, 502 (1951) (*citing Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1922)); Sup. Ct. R. 10; *See also Rice v. Sioux City Memorial Park Cemetery, supra,* 349 U.S. at 79.

No such public principles are at stake in this case. This suit is a title contest that was removed to federal court solely on the basis of diversity of citizenship between the parties. It involves no federal or constitutional questions. It presents no "special and important reasons" warranting consideration by this Court. This case affects no interest other than the private apportionment of mineral royalties among these family members. The resolution of this case ultimately turns upon the application of unique principles of Louisiana donations, sales, and property law.

In *Lyons v. Fisher I,* petitioner's app. 1c-10c, the 1968 donation on which Franklin Fisher bases his claim to his nieces' mineral interest was unanimously held invalid by three federal judges sitting in Louisiana and having familiarity with that State's law. The opinion was authored by Circuit Judge John Minor Wisdom, who practiced law in Louisiana and who is an authority in Louisiana property and donations law. (*See, e.g.,* 60 Tul. L. Rev., vol. 2 (1985)).

The 1968 donation was held invalid because it violated Louisiana Civil Code article 1533. This statute was repealed nonretroactively in 1974, and therefore has no prospective interest to the public—even in Louisiana.

Louisiana Civil Code article 1533 prohibited the owner of immovable (real) property from donating that property while reserving the usufruct of the property. La. Civ. Code art. 1533 (repealed and amended 1974); *Lyons v. Fisher I,* petitioner's app. 4c-7c. Under Louisiana law, a usufruct of property includes most of the rights and prerogatives of ownership; it is the right to use, possess, and enjoy the property, and to receive the fruits of the property, until the death of the unsufructuary. *Id.*, petitioner's app. 3c n.2; La. Civ. Code arts. 550-569. The usufruct of a 160-acre farm would include the right to keep the proceeds

of the sale of crops, La. Civ. Code arts. 550-551, the proceeds of timberland management, *Id.*, art. 562, and the products of farm animals, *Id.*, art. 561, in addition to the right to live on the land and use it.

Prior to its repeal, Civil Code article 1533 provided: "The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself." *See Lyons v. Fisher I,* petitioner's app. 5c. Under this statute, any donation of real property containing a direct *or indirect* reservation of the usufruct was absolutely null, and would be given no legal effect or reality. Such donations were considered a serious threat to Louisiana public policy because they would allow owners to donate property at death (*i.e.,* reserve the right to use the property during life) without following the Louisiana laws pertaining to successions and wills, possibly circumventing death taxes and Louisiana's forced heirship law. *Lyons v. Fisher I,* petitioner's app. 5c, n.7; *accord, Clarke v. Brecheen,* 387 So. 2d 1297, 1300 (La. App. 1st Cir.), *writ denied,* 394 So. 2d 606 & 607 (La. 1980), *appeal after remand,* 415 So. 2d 550 (La. App. 1st Cir. 1982); *Succession of Simpson,* 311 So. 2d 67 (La. App. 2d Cir.), *writ denied,* 313 So. 2d 839 (La. 1975); *Estate of Richard v. Richard,* 321 So. 2d 375 (La. app. 3d. Cir. 1975); *Whitten v. Whitten,* 303 So. 2d 328 (La. App. 2d Cir. 1974); *Crain v. Crain,* 175 So. 2d 665 (La. App. 1st Cir. 1965); *Succession of Delauney,* 138 So. 2d 41 (La. App. 1st Cir. 1962).

One day after Julie Ida Fisher donated the Northwest Quarter—a 160-acre farm—to Hazel and Franklin, Hazel and Franklin purported to "sell" the usufruct of the Northwest Quarter back to the donor for "TEN AND NO/100 ($10.00) DOLLARS and other good and valuable consideration." *Lyons v. Fisher II,* peti-

tioner's app. 4a. By these virtually simultaneous transactions, Julie Ida Fisher attempted to circumvent article 1533 by donating property to her children, who immediately thereafter "sold" the unsufruct to her.

In *Lyons v. Fisher I,* petitioner's app. 4c-7c, the appellate court ruled that by donating the Northwest Quarter to her children and, at the same time, having the children reconvey the usufruct of the property, Julie Ida Fisher violated Civil Code article 1533. In so ruling, the court noted the timing of the donation and usufruct sale (they were one day apart), and the overall effect of the transactions (it was precisely what article 1533 forbade). The court also noted the usufruct sale recited only nominal consideration. Under Louisiana law, neither the ten dollars recited in the sale agreement (signed by Franklin Fisher) nor the $450 Fisher now claims was paid is sufficient consideration to support the "sale" of the lifetime usufruct of a 160-acre farm. La. Civ. Code art. 2464(4); *Lyons v. Fisher I,* petitioner's app. 5c-6c. Louisiana's civil law is entirely different from the common law in regard to what is sufficient consideration to support a true "sale" of real property. While the slightest consideration may be sufficient to support the sale of such property under the common law, under Louisiana law consideration must be proportionate to the value of what is sold, or the so-called sale is considered, in actuality, a donation. La. Civ. Code art. 2464(4); *See, e.g., Murray v. Barnhart,* 117 La. 1023, 42 So. 489, 492 (1906). Merely boilerplating the sale with the words "and other good and valuable consideration" does not suffice to show serious consideration because, under Louisiana law, consideration must be "certain, that is to say, fixed and determined by the parties," at the time of the sale. La. Civ. Code art. 2464; *Lyons v. Fisher I,* petitioner's app. 6c n.13; *Conway v. Bordier,* 6 La. 346 (1834).

The usufruct transaction was therefore a gift or reservation, not actually a "sale," and this was reflected not only on the face of the transaction but by Franklin Fisher's deposition testimony that had been put into evidence. *Lyons v. Fisher II,* petitioner's app. 7a. This supported—but was not the sole grounds for—the court's conclusion that this simultaneous donation/usufruct sale violated Civil Code article 1533.

This case, therefore, ultimately turns on unique principles of Louisiana sales, donations, and property law. More particularly, the case turns on the interpretation and application of Louisiana Civil Code article 1533. That article was repealed in 1974, and is no longer of prospective interest—even in Louisiana. To repeat, this case is a Louisiana mineral title dispute that was removed to federal court solely on the basis of diversity of citizenship jurisdiction. It involves no federal or constitutional questions, and involves no public interest justifying consideration by this Court. This case affects no interest beyond the private apportionment of mineral royalties between an uncle and his three nieces.

2. *The court below correctly applied the law-of-the-case doctrine in accordance with the decisions of this Court and the circuit courts of appeals. Franklin Fisher's claim that this doctrine was misapplied is founded on an incorrect statement of the proceedings below.*

Franklin Fisher argues the law-of-the-case doctrine should not have been applied in this case. To the contrary, if there ever was a case warranting the application of that doctrine, it is this one.

To begin with, Franklin Fisher's argument rests upon an inaccurate statement of the proceedings below. He repeatedly asserts that when he moved for summary judgment the validity of the 1968 donation was not at issue. The court of appeals, he claims, for no apparent reason took up this issue *sua sponte* and decided it.

Even a cursory reading of the decisions below will show that this is simply incorrect.

Franklin Fisher's motion for summary judgment was based squarely on the claim that he owned the disputed mineral interest. When Franklin Fisher moved for summary judgment, he put a certified copy of the 1968 donation into evidence, and affirmatively pleaded its validity as part of his title to the property. *Lyons v. Fisher II,* petitioner's app. 7a. He filed an affidavit asserting the validity of this donation/usufruct sale as part of his title to the disputed interest.

In opposing his motion, the Fisher Nieces attacked the validity of the 1968 donation. *Id.* The Fisher Nieces contended the donation violated article 1533 because the donees simultaneously sold the usufruct back to their mother, the donor. The Fisher Nieces further argued that the so-called "sale" of the usufruct was a sham because the donor did not in fact buy the usufruct for its true worth. In support of this, the Fisher Nieces pointed to the "ten dollars" recited in the sale instrument, and also introduced Franklin Fisher's deposition testimony into evidence—testimony in which, when asked what consideration was paid for the usufruct, Fisher mentioned no consideration whatsover other than the $10 recited in the sale, and characterized the usufruct transaction as a gift or reservation, not a sale. *Id.*

In response, Franklin Fisher argued that the usufruct was not technically "reserved" in violation of article 1533, but was "sold" to the donor. He argued that the consideration recited in the usufruct sale was sufficient to support a sale under Louisiana law. *Id.* The validity of the 1968 donation was briefed in detail by each party, and was argued at the oral argument. In granting summary judgment to Franklin Fisher, the district court expressly noted that "[t]he parties dispute the validity of Julie Fisher's 1968 donation of the Northwest Quarter." Ruling, *Lyons v. Fisher* No. 85-3629 (W.D. La. Oct. 13, 1987) (reprinted in Petitioner's Petition for Writ of Certiorari, app. 3d).

After summary judgment was granted in favor of Franklin Fisher, the Fisher Nieces appealed the case *on grounds that the 1968 donation was invalid because it violated Civil Code article 1533. See Lyons v. Fisher I,* petitioner's app. 2c. "[O]n appeal this issue was squarely briefed and argued before the prior panel." *Lyons v. Fisher II,* petitioner's app. 7a. *See Lyons v. Fisher I,* petitioner's app. 4c-7c.

Thus, this issue was raised and briefed a number of times by each party prior to the first appellate ruling. Franklin Fisher was *deposed* on this issue. This issue was not whisked out of thin air, or created *ex nihilo* by the appellate court, as Franklin Fisher suggests.

After the court of appeals ruled that the 1968 donation violated article 1533, and the case was remanded, Franklin Fisher attempted an end run around the decision by confecting an affidavit claiming to have suddenly "recalled" receiving a $450 payment for the usufruct, rather than the $10 recited in the sale instrument. This was the first time in this three-and-one-half-year-old case that

he claimed to have received such a payment. Furthermore, this claim is inconsistent with his deposition testimony. On the basis of this affidavit, he asked the district court to declare the 1968 donation valid, in direct contravention of the court of appeals mandate on the validity of the 1968 donation.

> The law-of-the-case doctrine
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> > precludes re-examination of issues of law or fact decided on appeal, either by the district court on remand or by the appellate court itself on a subsequent appeal. This doctrine "is based on the salutary and sound public policy that litigation should come to an end." *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). Indeed, if every question once considered and decided remained open for re-examination in subsequent proceedings in that same case, an appellate court could not effectively or satisfactorily perform its duties. Moreover, the law-of-the-case doctrine "discourages 'panel shopping' at the circuit level for in today's climate it is most likely that a different panel will hear subsequent appeals." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 662 (5th Cir. 1974), *cert. den.*, 420 U.S. 929, 95 S. Ct. 1128, 43 L.Ed. 2d 400 (1974).

Todd Shipyards Corp. v. Auto Transp., S.A., 763 F.2d 745, 750 (5th Cir.), *reh'g denied*, 770 F.2d 164 (5th Cir. 1985).

The application of the law-of-the-case doctrine by the courts below is consistent with that doctrine as applied by this Court, *United States v. Camou*, 184 U.S. 572, 574 (1901), as well as the circuit courts of appeals. *E.g., Smith International, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579-80 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 827 (1985), *on remand*, 839 F.2d 663 (Fed. Cir. 1988); *Waggoner v.*

Dallaire, 767 F.2d 589, 593 (9th Cir 1985), *cert. denied*, 475 U.S. 1064 (1986); *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984), *reh'g denied*, 747 F.2d 710 (11th Cir. 1984); *Baumer v. United States*, 685 F.2d 1318 (11th Cir. 1982); *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674 (10th Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972), *appeal after remand*, 490 F.2d 521 (10th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); *Paull v. Archer-Daniels-Midland Co.*, 313 F.2d 612 (8th Cir. 1963).

The law-of-the-case doctrine serves a number of crucial functions. It "promotes judicial efficiency by serving the purpose of insuring that litigation on an issue will come to an end, discouraging 'panel shopping' at the circuit level, and assuring the obedience of lower courts to the decisions of appellate courts." *Westbrook v. Zant, supra*, 743 F.2d at 768.

Franklin Fisher claims the law-of-the-case doctrine was "grossly misapplied" by the courts below because, after the 1968 donation's validity was ruled upon by the court of appeals (after being extensively briefed and argued several times by the parties, before both the district court and the court of appeals), he was not permitted to ignore that ruling on remand simply by renouncing and supplementing parts of his evidence. But to allow litigants to do that would be to abolish the doctrine.

All federal circuit courts of appeals, including the Fifth Circuit, recognize an exception to the law-of-the-case doctrine where "substantially different evidence" is presented on remand. *See Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1005 (5th Cir.), *reh'g denied*, 693 F.2d 133 (5th Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983), *reh'g denied*, 641 U.S. 924 (1983). It is also well-recognized, however, that the "substantially different evidence" excep-

tion does not apply when the issue decided on appeal is not left open for the taking of new evidence. *United States v. Camou, supra,* 184 U.S. at 574; *Goodpasture, Inc. v. M/V Pollux, supra,* 688 F.2d at 1006 n.5; *National Airlines, Inc. v. International Assoc. of M.&A.W.,* 430 F.2d 957, 960 (5th Cir. 1970), *aff'd after remand,* 478 F.2d 1062 (5th Cir. 1973), *cert. denied,* 400 U.S. 992 (1973); *Paull v. Archer-Daniels-Midland Co., supra,* 313 F.2d at 617. If the law of the case could be ignored simply by confecting an affidavit supplementing, renouncing, or changing one's record "evidence" pertaining to the decided issue, any ruling by a court of appeals or by this Court could simply be ignored on remand. *See Paull v. Archer-Daniels-Midland Co., supra,* 313 F.2d at 616. As here, a disgruntled party wanting another "at bat" only would need to read the court of appeals' decision, then fashion an affidavit addressing the concerns discussed by the court of appeals. *See Drachenberg v. Canal Barge Co., Inc.,* 612 F.2d 760 (5th Cir.), *reh'g denied,* 626 F.2d 172 (5th Cir. 1980). "[T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." *United States v. Camou, supra,* 184 U.S. at 574.

Franklin Fisher argues that, because he moved for summary judgment, he had "no obligation" to adduce evidence on the key, controverted issue of the validity of the 1968 donation. He was within his rights, he suggests, to withhold such evidence while the parties briefed and argued the issue, and until after the courts ruled on the issue, then to use that evidence to try to undermine the courts' rulings. But a motion for summary judgment is not simply a "free shot" at an opponent. *See* Fed. R. Civ. P. 56(d). Nor is a party moving for summary judgment entitled to withhold evidence on key issues directly raised by the

motion. In a motion for summary judgment, "it is the duty of the party litigants to fully disclose all evidence which sheds any light in explanation of the allegations which appear in the pleadings." *Bowels v. Ward*, 65 F. Supp. 880, 889 (W.D. Pa. 1946); *accord, Carr v. Goodyear Tire & Rubber Co.*, 64 F. Supp. 40, 50-51 (S.D. Cal. 1945). Under Fed. R. Civ. P. 56(d), some litigants moving for summary judgment have had summary judgment rendered *against* them because they failed to contradict evidence on a dispositive issue raised by their opponents. *See, e.g., Siderius, Inc. v. M.V. Ida Prima*, 613 F.Supp. 916, 923 (S.D.N.Y. 1985); *Procter & Gamble Ind. U. v. Procter & Gamble Mfg. Co.*, 312 F.2d 181, 190 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963); *Local 33, Int. Hod Carriers, etc. v. Mason Tenders, etc.*, 291 F.2d 496, 505 (2d Cir. 1961).

Franklin Fisher's claim he actually received $450 for the usufruct does not square with either the sale instrument or his earlier deposition testimony. The sale instrument (signed by Fisher) is a sworn, notarial act, and if his deposition answers were incorrect or inaccurate, he failed to set the record straight as required by Fed. R. Civ. P. 26(e)(2) ("A party is under a duty seasonably to amend a prior [discovery] response if . . . the party knows that the response was incorrect when made"). If he had such evidence he had every "reason and incentive" to reveal this evidence at his deposition when questioned specifically on this issue, and to reveal it when this issue became the central disputed issue on his motion for summary judgment. For him to now assert that he never had an "opportunity" or "reason" to present this evidence is simply wrong.

And he cannot fault the court of appeals for deciding an issue it was specifically called upon to resolve. *See Lyons v. Fisher I*, petitioner's app. 2c.

Franklin Fisher next claims the decision below conflicts with this Court's holding in *United States v. United States Gypsum Co.*, 240 U.S. 76 (1950). In *United States Gypsum Company*, after the plaintiff presented evidence at trial, the plaintiff's suit was involuntarily dismissed for failure to state a claim for relief, under Fed. R. Civ. P. 41(b). This Court reversed that dismissal, holding that the plaintiff's evidence stated a "prima facie" case against the defendant. On remand, the defendant presented evidence countering the plaintiff's claims, but the lower court granted summary judgment in favor of the plaintiff. When the case was later appealed again to the United States Supreme Court, this Court affirmed the summary judgment, but acknowledged that its earlier ruling did not preclude the defendant from introducing evidence on remand. Franklin Fisher argues that this holding means that summary judgment may *never* be granted on the basis of the law of the case so long as the opposing party's attorney can think of some new twist of evidence to argue.

But *United States Gypsum Company* does not hold this at all.

Whether an issue has been ruled upon so as to become the law of the case depends upon the *mandate* of the higher court. The court's mandate is its instructions to the lower court. In *United States Gypsum Company*, this Court simply ruled that the evidence presented by the plaintiff constituted a "prima facie case," which means a case "such as will prevail until contradicted and overcome by other evidence." BLACK'S LAW DICTIONARY 1071 (5th Ed. 1979). Such a ruling in no way prohibits a defendant from putting on evidence — — it *invites* the defendant to do so.

In reversing the summary judgment granted in favor of Franklin Fisher, however, the court of appeals did not state that the plaintiffs had made out a "prima facie case." It very clearly and unequivocally ruled that the 1968 donation was an absolute nullity, and remanded the case for further proceedings consistent with that decision. *Lyons v. Fisher I,* petitioner's app. 6c-7c; *Lyons v. Fisher II,* petitioner's app. 6a-7a. The *mandate* in *Lyons v. Fisher I* was a completely different one than that of *United States Gypsum Company.*

Franklin Fisher next suggests that the decisions below conflict with *Pubali Bank v. City National Bank,* 777 F.2d 1340 (9th Cir. 1985) and *United States v. Robinson,* 690 F.2d 869 (11th Cir. 1982).

Pubali Bank is similar to *United States Gypsum Company,* and is distinguishable from the present case for the same reason. Just as in *United States Gypsum Company,* the *Pubali Bank* court of appeals first ruled that the plaintiff had made out a "prima facie case" against the defendants, stating: "Solely on the basis of the case made out by [the plaintiff] in chief, [the defendants] would be jointly liable to [the plaintiff] for its losses . . . If [the defendants] had rested at that point, [the plaintiff] would have been entitled to the restoration of the funds drawn against it." *Pubali Bank v. City National Bank,* 676 F.2d 1326, 1330 (9th Cir. 1982).

When the case was remanded, summary judgment was granted in the plaintiff's favor on the basis of the appellate decision. On the second appeal, the appellate court held summary judgment should not have been granted on the basis of the first appellate decision.

Once again, that ruling follows rather obviously from the *mandate* in that case. If a court of appeals merely states that a plaintiff has made out a "prima facie" case, this is not a final ruling on the issue. In the present case, the court of appeals *ruled that the 1968 donation was an absolute nullity,* and remanded for further proceedings consistent with that decision. This is an entirely different mandate than the one rendered in *Pubali Bank.*

United States v. Robinson, 690 F.2d 869 (11th Cir. 1982) was an appeal of a conviction of the defendant for drug trafficking. The issue was whether the defendant had been coerced into accompanying the arresting officer into a private office where the defendant consented to a search.

United States v. Robinson is an anomaly. An honest comparison of this case with its earlier appeal, *United States v. Robinson,* 625 F.2d 1211 (5th Cir. 1980), will reveal that it is merely a rare instance in which a court of appeals recognized that its earlier ruling was based upon a complete misreading of the record — — a factual assumption that simply was not in the record. In the case *sub judice,* the court of appeals had the opportunity to review the prior panel's ruling and concluded it was squarely based on a correct appraisal of the record evidence.

Neither of these cases, therefore, fits the facts of this case.

CONCLUSION

This diversity of citizenship case ultimately turns on issues of Louisiana donations, sales, and successions law. The key statute on which the case revolves, Louisiana Civil Code article 1533, was repealed in 1974 and is no longer of prospective interest, even in Louisiana. This case involves no federal or constitutional questions, and has no compelling interest to the public at large. It simply concerns the private apportionment of mineral revenues among family members. Furthemore, the decisions below are in full accord with Louisiana law and the law-of-the-case doctrine as applied in other circuits and by this Court.

For these reasons, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick D. Gallaugher, Jr., a member of the Bar of this Court, hereby certify that, as counsel for the plaintiffs-respondents, I received a copy of the Petition for Writ of Certiorari on April 2, 1990, and that three copies of the Respondents' Brief in Opposition to the Petition for Writ of Certiorari were mailed, first class postage prepaid, to Harry A. Rosenberg, counsel for the petitioner. I further certify that all parties required to be served have been served.

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